UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE APRIL 13, 2015 GRAND JURY SUBPOENA 15 Misc. 102

O R D E R

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Sweet, D.J.

Treating this April 17, 2015 letter as an application for an Order to Show Cause as to why the grand jury subpoena dated April 13, 2015 should not be modified, it is hereby:

ORDERED that the motion to quash or modify will be heard on April 28, 2015 at 10:00 AM before the Honorable Naomi Reice Buchwald as Part I Judge in courtroom 21A; it is further

ORDERED that any opposition by the Government will be served and filed on April 23; it is further

ORDERED that any reply by the estates of John and Barbara Caggiano will be served and filed on April 27; it is further

ORDERED that the articles subject to the subpoena will be held by the Government pending dispositions of the motion and further order of the Court; and it is further

ORDERED that this Order to Show Cause be served upon the Government by 5:00 PM on April 17, 2015.

Dated: New York, New York
April 17 2015

Robert W. Sweet, U.S.D.J.

15 MISC 00102

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April 17, 2015

Honorable Robert W. Sweet
Part 1 Judge
United States District Judge
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007-1312

Re: In the Matter of the Second Subpoena, dated April 13, 2015, issued by Assistant United States Attorney Margaret Graham to Doyle New York to produce business records but which instead demanded the provision of property belonging to the Estates of John and Barbara Caggiano,

Dear Judge Sweet:

This firm represents the estates of John and Barbara Caggiano ("Estates") and Margaret Tanchuck as Executor of the Estates. Ms. Tanchuck's, father, John Caggiano, died in 2009 and her mother, Barbara Caggiano, died in 2013. We are writing at the suggestion of Assistant United States Attorney Margaret Graham to request the Court's supervision over an aspect of the grand jury proceedings from which the above-referenced subpoena was issued and served by email (Exhibit A, attached).

Through this subpoena, the federal government has insinuated itself into an actively contested ongoing civil case underway in Nassau County. (See the Verified Amended Complaint, Exhibit B.) That case is between Ms. Tanchuck, as Executor of her parents' Estates and the New York Public Library (NYPL), and it will resolve the question of who has legal title to several valuable items which have been in possession of the Estates of Ms. Tanchuck's parents for almost three decades—the same items that the above-referenced subpoena was in artfully deployed to seize. While the NYPL claims to have possessed them once, it concedes in an email message to appraiser Doyle New York (Doyle) that, in NYPL's "rough estimation," the Library lost possession of them sometime during a three-year window "between 1988 and 1991." And, over the course of nearly three decades, the NYPL made no efforts - none - to recover, or to list as lost, or to make an insurance claim for, or to report as missing to the police, or to ever

announce that the items were not in their possession, until Ms. Tanchuck, in the normal course of administering her parents' Estates, discovered them, and, as required as part of her duties as Executor, dutifully sought to have them appraised by expert appraisers at Doyle.

While conducting its necessary due diligence, in July 2014, Doyle contacted the NYPL and, for the first time in almost 30 years, the NYPL asserted a claim to title, based only on the NYPL's inability to produce any sort of documentation explaining how the items left their possession. The NYPL claim that no documentation exists is remarkable, as it is rooted in its admitted identical inability to account for the contested material for almost 30 years.

After the NYPL advanced its claims, Ms. Tanchuck and the NYPL began contesting rightful ownership through their lawyers. Those dealings culminated in a meeting between the Estates' counsel and attorneys representing the NYPL on January 29, 2015, during which the NYPL flexed its political muscle and threatened to deploy state police and federal investigators against the Estates and against Ms. Tanchuck personally. Unswayed by this questionable litigation tactic, and relying on the doctrine of laches as clearly explained in *Bakalar v. Vavra,* 819 F. Supp 293, 303(S.D.N.Y. 2011) which, in our view, firmly cements title in the Estates' favor, Ms. Tancheck on April 3, 2015, initiated a civil action (subsequently amended on April 9) in New York State court to request a declaratory judgment of clear title. The filing of the complaint was reported in the press. (See, e.g., the press report in Exhibit C.)

Then, with civil litigation underway, NYPL carried out its January threat. Counsel for Ms. Tanchuck received a call from AUSA Graham, indicating that she was investigating Ms. Tanchuck for a crime. Specifically, she stated that her investigation was centered, not on how and when the items at issue left the NYPL (because of course the NYPL admits there is no evidence of that), but instead on whether Ms. Tanchuck had violated 18 USC § 668, Theft of Major Artwork, by asking Doyle to appraise them. AUSA Graham characterized that as an effort to "dispose" of the material under the statute. Remarkably, AUSA Graham suggested that such conduct, acts which Ms. Tanchuck had a legal duty to undertake as Executor of her parents' Estates, might constitute a crime. She blinked at the fact that Ms. Tanchuck had already sworn in her Verified Complaint that she had no idea how the material had become part of her parents' Estates, nor did she have access to any relevant information, obviously because her parents were deceased and there was no documentation explaining the provenance. A simple reading of the federal statute makes clear that criminal liability only attaches upon a showing that the defendant "knows" the materials had "been stolen or obtained by fraud."

AUSA Graham informed the undersigned that, on or about April 6, 2015, Doyle received the first subpoena directing a Doyle representative to appear to give testimony before a grand jury and also to "hold" the items in controversy. Thereafter, on April 9, 2015, at 5:00 P.M. Ms.Tanchuck's lawyers filed an Order to Show Cause in New York State Civil Court demanding a hearing to address the conditions under which the materials could or would be maintained by

Doyle, and seeking an order requiring the material to be insured while it remained in Doyle's custody. In response, according to the email from AUSA Graham, at 6:08 P.M. that evening, she emailed a new subpoena (Exhibit A) to Doyle, ostensibly demanding Doyle to produce their business's "books and records," but actually requiring Doyle, instead, to produce only the contested items at issue in the civil case (and not demanding any business books or records at all). Then on April 10, 2015, a federal agent, acting on the U.S. Attorney's behalf, appeared at Doyle to collect the demanded items. Doyle, quite understandably wanting out of the dispute, did not contest this federal agent's demand. Thus, now, despite litigation being fought between the Estates on one hand and the NYPL on the other, over items previously held by Doyle New York, none of the interested parties now possess the contested items. Instead, they are now held by the federal government pursuant to AUSA Graham's "business records" subpoena, while acting as the NYPL's proxy to facilitate the Library's claim of ownership. On April 10, 2015, AUSA Graham called counsel for the Estates, leaving a message that the items had been seized, and suggesting that the Order to Show cause was unnecessary because Doyle no longer had them.

On April 15, 2015, undersigned counsel and his associate, Ria Rana, appeared at the office of AUSA Graham to discuss the case. During this discussion, we reiterated that the subpoenaed items were already the subject of an open and active civil controversy in state court regarding the doctrine of laches, statute of limitations, and rightful ownership. We provided documentation of the pending case and communications between Doyle and the Estates and between NYPL and Doyle. I asked for AUSA Graham's agreement that she would promptly return the items in accordance with the court's order, either to the Estates or the NYPL, depending on whom prevailed, when the state court determined who had title. She refused to agree and suggested that I pursue this route to address the issue.

Our proposal to AUSA Graham would allow the government to temporarily maintain possession over the contested items, notwithstanding several significant problems with its purported grand jury "subpoena." Grand juries have broad power, after all, but a grand jury subpoena is not a "talisman that dissolves all constitutional protections." *United States v. Barr*, 605 F. Supp. 114, 117 (S.D.N.Y. 1985) (citing *United States v. Dionisio*, 410 U.S. 1, 11 [1973]). Grand juries are intended for bona fide investigations, in other words, not for gaining leverage on behalf of other public institutions engaged in separate litigation. *See, e.g., United States v. Fisher*, 455 F.2d 1101, 1104-05 (2d Cir. 1972) (noting that the "grand jury is not meant to be the private tool of a prosecutor"). They are also not intended to be used merely to intimidate. *See United States v. Kelly*, 305 Fed. Appx. 705, 708 (2d Cir. 2009) (declining to quash a subpoena where it was not served "with intent to intimidate or harass"). Indeed, a "subpoena duces tecum may violate the fourth amendment if government agents improperly impinge on the defendant's right to contest the subpoena's validity or a court's authority to quash, alter or enforce it"; and, while a lack of notice alone is not decisive, "[w]hether the defendant has notice of the subpoena

is related to the opportunity to challenge the subpoena and is also a factor to be considered." *Barr*, 605 F. Supp. at 118.

Guided by those principles, and although the subpoena is clearly deeply flawed, we seek merely to modify it and not to quash it. Our goal is only to assure what AUSA Graham has refused to agree to, that is, to promptly return the contested items to the prevailing party after a court finally has decided who has title to them. The flaws in the subpoena are manifest, since it seems obvious that it was issued to give tactical benefit to NYPL's position in the ongoing state civil controversy. The items had been safe where they were; they were not at risk of being lost or damaged as they were already the subject of a pending civil action that Ms. Tanchuck herself had commenced as Executor of the Estates. The insinuation of law enforcement in exactly the way the NYPL inappropriately had threatened on January 29, 2015 is troubling enough. Moreover, those threats have now materialized in inappropriate grand jury subpoenas. A grand jury investigation is supposed to be a judicial proceeding, not the plaything of a well-connected institution.

Second, there is absolutely no basis to suspect the Executor, Ms. Tanchuck, of a crime—a point corroborated by the fact that her innocent state of mind ***forms the basis of the Estates' claims in state court***. Plainly, if a person's intent were to knowingly turn stolen items into cash, he or she simply would turn to illegal markets. But Ms. Tanchuck instead went to one of the most reputable and respected appraisers in New York, where she knew an investigation into the items' chain of title would commence, in order to assure the Estates' ability to handle the items. And after learning of NYPL's claim of purported ownership, she came forward with a frank and detailed complaint publicly filed in state court with her name in the caption. Clearly, Ms. Tanchuck lacks the state of mind required for criminal prosecution, yet the government remains involved on behalf of the NYPL in the civil claims against the NYPL through the guise of a meritless investigation.

Third, even if the government had reason to investigate Ms. Tanchuck for a crime, it would still lack any need to maintain ***continued*** possession of the subpoenaed items. The government cannot learn anything more from its possession of the subpoenaed items about Ms. Tanchuck's *mens rea*, than it already knows; there is nothing intrinsic to the contested items which could shed light on Ms. Tanchuck's *mens rea*. Notably, the subpoenaed items are not business records comprised of extensive computer files or reams of complicated papers documenting relevant and contemporaneous business transactions. They are not business records at all; they are simply ancient artifacts.[1]

[1] Bizarrely, as can be seen, the subpoena requires the Doyle agent responding to attest to the items as "business records made at or near the times of the occurrence of the matters set forth in the record by, or from informal transmittal by a person with knowledge of those matters," which "were kept in the course of regularly conducted business activity," and "were made by the regularly conducted business activity as a regular practice." Obviously, what were seized are not business records, but rather are items which might have been sought by a warrant, if there

Certainly, we do not intend to rush the government through an investigation; that is why we proposed to AUSA Graham that she keep the contested items for the duration of Ms. Tanchuck's state court litigation, and then return the items to the prevailing party. Her refusal to agree to this common-sense approach tends to support the conclusion that her office is being used as a tool by the NYPL to gain an advantage in the civil litigation. That litigation will likely take months, if not years, to resolve. Such time should be more than sufficient for the government to decide what it wants to do.

When AUSA Graham refused to agree to return the items to the adjudged title holder at the end of the case, we became concerned. At that point, she explicitly invited counsel to seek the supervision of this Court. Accordingly, we now ask the Court to supervise the government's grand jury proceedings in this matter, to the extent necessary to prevent the contested items from prolonged seizure and detention by the United States government, beyond the conclusion of the Estates' state claims. The Court has inherent authority to conduct such supervision to prevent the perversion or misuse of the grand jury process. *See, e.g., In re Grand Jury Investigation (General Motors Corp.)*, 32 F.R.D. 175, 181 (S.D.N.Y. 1963) ("The grand jury is subject to control and supervision of the court. General Motors' claim of abuse of process, even absent *locus standi*, is sufficient to invoke this court's inherent power to supervise the grand jury so as to prevent the perversion of its process"). This is especially true here, where the central issues involve subpoenas—which through the threat of contempt explicitly secure compliance by summoning the Court's authority.[2]

In short, we request that through the Court's inherent authority to supervise, or through a subpoena modification order, the Court ensure that the contested items be returned to the party adjudged to be the title holder at the conclusion of the New York State civil action.

Sincerely,

Daniel N. Arshack, Esq.

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were sufficient basis to support one, or by seizure and subsequent forfeiture if there were a basis to believe they were proceeds of crime. But there is no such basis. In any event, with regard to the improvident subpoena, it is respectfully suggested that such an attestation from personal knowledge would be impossible, since the written "records"—a ledger connected to Ben Franklin, and various books of the Old and New Testaments—purport to describe transactions conducted in Philadelphia nearly three centuries ago, or events that reportedly occurred not later than two millennia ago. In this case, however, there is no evidence of any crime. According to the NYPL, which has never claimed a theft, there are merely no records. No one knows how the items left the library almost 30 years ago. They may have been sold or traded and the records lost, or they may have been stolen and the library did nothing about it. There is no ground to favor one conclusion over the other. What is clear, however, is that the items have been in the Estates' possession for approximately 30 years. Who should have title to the items is what the civil action is intended to resolve.

[2] To the extent the Court declines to rely upon its inherent supervisory authority over the grand jury, we request, in the alternative, that pursuant to Fed. R. Crim. P. 17(c)(2), the Court simply modify the subpoena to impose a time limitation on the government's authority to maintain possession over the items.

CC: By Hand
A.U.S.A. Margaret Graham
1 St. Andrew's Plaza
New York City, NY 10007

15 MISC 00102

Barket, Marion, Epstein & Kearon, LLP

Attorneys at Law

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When AUSA Graham refused to agree to return the items to the adjudged title holder at the end of the case, we became concerned. At that point, she explicitly invited counsel to seek the supervision of this Court. Accordingly, we now ask the Court to supervise the government's grand jury proceedings in this matter, to the extent necessary to prevent the contested items from prolonged seizure and detention by the United States government, beyond the conclusion of the Estates' state claims. The Court has inherent authority to conduct such supervision to prevent the perversion or misuse of the grand jury process. *See, e.g., In re Grand Jury Investigation (General Motors Corp.)*, 32 F.R.D. 175, 181 (S.D.N.Y. 1963) ("The grand jury is subject to control and supervision of the court. General Motors' claim of abuse of process, even absent *locus standi*, is sufficient to invoke this court's inherent power to supervise the grand jury so as to prevent the perversion of its process"). This is especially true here, where the central issues involve subpoenas—which through the threat of contempt explicitly secure compliance by summoning the Court's authority.[2]

In short, we request that through the Court's inherent authority to supervise, or through a subpoena modification order, the Court ensure that the contested items be returned to the party adjudged to be the title holder at the conclusion of the New York State civil action.

Sincerely,

Daniel N. Arshack, Esq.

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[2] To the extent the Court declines to rely upon its inherent supervisory authority over the grand jury, we request, in the alternative, that pursuant to Fed. R. Crim. P. 17(c)(2), the Court simply modify the subpoena to impose a time limitation on the government's authority to maintain possession over the items.

CC: By Hand
A.U.S.A. Margaret Graham
1 St. Andrew's Plaza
New York City, NY 10007

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

April 23, 2015

BY HAND AND ECF

The Honorable Sidney H. Stein
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *In Re April 13, 2015 Grand Jury Subpoena*, 15 Misc. 102

The Government writes in response to the April 17, 2015 letter of Daniel Arshack, Esq., who represents an estate and its executrix Margaret Tanchuck (the "Petitioners"). In it, Petitioners request the Court's "supervision" over the Government's April 13, 2015 subpoena to the Doyle New York (the "Subpoena"). On April 17, 2015, the Honorable Robert W. Sweet, as Part I Judge, construed the letter as a motion to quash or modify the Subpoena, and set a briefing schedule and an April 28, 2015 oral argument date before Your Honor.

The Government opposes Petitioners's motion to quash or modify the Subpoena. Rule 17 of the Federal Rules of Criminal Procedure states that the court may quash or modify a subpoena "if compliance would be unreasonable or oppressive." Petitioners have made no such showing, nor can they. Further, to the extent that Petitioners's motion may be construed as a motion for the return of property under Rule 41(g) of the Federal Rules of Criminal Procedure, Petitioners have not met their burden of demonstrating either that the property at issue properly belongs to them, or that the Government's need for the property as evidence has ended.

I. Procedural History

A federal grand jury in this District is investigating the theft of eight priceless books from the New York Public Library (the "Library"): (i) a workbook for Benjamin Franklin's printing house from 1759 to 1776, and (ii) seven bibles, which were created between 1672 and 1861 (the "Contested Items" or the "Items"). In 2014, Petitioners, a private estate in Long Island, brought the Contested Items to The Doyle, an auction house, in May 2014. Due to several readily observable indicators, including New York Public Library call numbers on the spines of the books and a New York Public Library ownership stamp on one of the books, The Doyle reached out to the Library. The Library confirmed that the Items were theirs, and that the Library had never sold the Items or authorized their removal from the Library. Petitioners nonetheless refused to return the Contested Items to the Library, first offering to sell back the

stolen books, then filing a state court action seeking a declaratory judgment that Petitioners had gained ownership of the Contested Items through the equitable doctrine of laches.[1]

The Library informed the United States Attorney's Office of the theft of the Contested Items, and the Office opened a grand jury investigation into the potential violation of federal law that had occurred within its jurisdiction.[2] Pursuant to this investigation, on April 7, 2015, the Government called Petitioners to request further information relevant to the investigation and to inform them that they were potential targets. On or about April 7, 2015, Petitioners contacted The Doyle and demanded the return of the Contested Items within 48 hours. On or about April 10, 2015, the Government again reached out to Petitioners, to inform them that it had requested that The Doyle maintain possession of the Contested Items for the time being. On April 13, 2015, Petitioners filed an Order to Show Cause in state court, seeking an order directing The Doyle to return the Contested Items to Petitioners. On April 13, 2015, the Government issued the Subpoena, which ordered The Doyle to produce the Contested Items by April 27, 2015. On April 14, 2015, the Government took the items into its possession, where they remain.[3]

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[1] Petitioners's laches argument does not appear to be consistent with governing New York case law. *See Solomon R. Guggenheim Foundation* v. *Lubell*, 77 N.Y.2d 311, 320 (1991) ("To place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would . . . encourage illicit trafficking in stolen art."); *see also In re Flamenbaum*, 22 N.Y.3d 962 (N.Y. 2013) (holding that doctrine of laches did not grant possession of ancient golden tablet to estate, where estate had not established that, had the museum taken steps to locate the tablet, the museum would have discovered its location).

[2] Title 18, United States Code, Section 668 criminalizes the theft of an object of cultural heritage from a museum, as well as any action to receive, conceal, exhibit, or dispose of such an item, knowing that it has been stolen or obtained by fraud.

[3] Petitioners misstate the date and nature of many of the relevant actions taken. For example, Petitioners incorrectly claim that the Subpoena was issued and the Contested Items were taken into the Government's possession on April 10. (Pet.'s Letter at 3.) Petitioners also claim that the Government called them after the seizure of the Items to inform them that the Items had been seized and to suggest that the Order to Show Cause was unnecessary. (*Id.*) In fact, the Government did not call the Petitioners after the items were seized, to discuss the Order to Show Cause or otherwise.

Further, Petitioners incorrectly represent that the Government "suggested" or "explicitly invited" them to make the instant motion. (*Id.* at 1, 3, 5.) No such thing occurred. On April 15, 2015, Petitioners told the Government that Petitioners would move to invalidate the Subpoena in federal court if the Government did not agree to immediately give the Contested Items to Petitioners in the event that they won the lawsuit. The Government declined to enter into Petitioners's proposed agreement at that time, but in no way "explicitly invited" a motion litigating the validity of the already-executed subpoena.

II. Motion to Quash or Modify the Subpoena

A grand jury is presumed to act within the legitimate scope of its authority "absent a strong showing to the contrary." *United States* v. *R. Enters., Inc.*, 498 U.S. 292, 300 (1991). Accordingly, "a grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance." *Id.* at 301; *see also United States* v. *Salameh*, 152 F.3d 88. 109 (2d Cir. 1998).

Petitioners have not shown why the Subpoena was unreasonable, or advanced any arguments of its invalidity, other than to quarrel with the stock language on the administrative piece of paper attached to the Subpoena titled "Declaration of Custodian of Records," which of course is not itself part of the Subpoena. [4] (Pet.'s Letter at 4 n.1; *id.*, Ex. A at 4.) Further, Petitioners cite no case law for the proposition that they may challenge a subpoena that has already been executed upon a third party.

Instead, Petitioners criticize the grand jury's investigation generally, based on Petitioners's limited knowledge of the scope and nature of the investigation. As set forth above, the Government has a good-faith basis for investigating the theft of important and valuable documents stolen from the Library, and Petitioners's suggestions otherwise are unwarranted. (Pet.'s Letter at 1, 2, 3, 4, and 5.) "Unlike [a] [c]ourt, whose jurisdiction is predicated upon a specific case or controversy, the grand jury can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not." *United States* v. *Williams*, 504 U.S. 36, 48 (1992) (internal quotation marks omitted). The Supreme Court has "insisted that the grand jury remain free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it." *Id.* at 48-49 (internal quotation marks omitted). Accordingly, given "the grand jury's operational separateness from its constituting court," the Supreme Court has "been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure." *Id.* at 49-50.

III. Motion for Return of Property

Petitioners's motion is perhaps more properly characterized as a motion under Rule 41(g) for the return of what they allege is their property. *See* Fed. R. Crim. P. 41(g) ("A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return."). Jurisdiction under Rule 41 "is to be exercised with great restraint and caution since it rests upon the court's supervisory power over the actions of federal law enforcement officials." *De Almeida* v. *United States*, 459 F.3d 377, 382 (2d Cir. 2006) (internal quotation marks omitted).

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[4] To the extent that Petitioners challenge the subpoena on relevancy grounds, "the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." *United States v. R. Enters., Inc.*, 498 U.S. 292, 300 (1991).

"To prevail on a Rule [41(g)] motion, a criminal defendant must demonstrate that (1) he is entitled to lawful possession of the seized property; (2) the property is not contraband; and (3) either the seizure was illegal or the government's need for the property as evidence has ended." *Ferreira* v. *United States*, 354 F. Supp. 2d 406, 409 (S.D.N.Y. 2005).[5] Petitioners have not made the required showings. First, they have not demonstrated that they are entitled to the lawful possession of the Contested Items, which are the property of the Library. Second, they have not shown that the Contested Items were unlawfully seized, nor can they, as they were seized as grand jury evidence pursuant to a properly executed subpoena.

Last, Petitioners cannot show that the Government's need for the Contested Items as evidence has ended, because the grand jury investigation continues. "A defendant's right to the return of lawfully seized property is subject to the Government's legitimate continuing interest in that property." *Lavin* v. *United States*, 299 F.3d 123, 128 (2d Cir. 2002); *see also United States* v. *Chambers*, 192 F.3d 374, 377 (3d Cir. 1999) ("If a motion for return of property is made while a criminal prosecution is pending, the burden is on the movant to show that he or she is entitled to the property."). "If the state 'has a need for the property in an investigation or prosecution, its retention of the property generally is reasonable' and a motion to return the property pursuant to Rule 41(g) will be denied." *Mirka United, Inc.* v. *Cuomo*, No. 06 Civ. 14292, 2007 WL 4225487, at *8 (S.D.N.Y. Nov. 27, 2007) (Lynch, J.) (quoting 1989 Advisory Committee Notes to Rule 41(e), predecessor to Rule 41(g)); *see also United States* v. *Rayburn House Office Building*, 497 F.3d 654, 663 (D.C. Cir. 2007) (same). Here, the Government needs to examine and analyze the Contested Items to further its investigation, and will also need the Items as evidence in any resulting prosecution.

In conclusion, Petitioners have not shown why the Subpoena should be modified after its execution, and a Rule 41(g) motion is not properly brought at this point, where Petitioners have not established that they are entitled to lawful possession of the Contested Items and the Government's need for the Items as evidence continues.

Very truly yours,

PREET BHARARA
United States Attorney

by: _/s/_____
Margaret Graham
Assistant United States Attorney
(212) 637-2923

cc: Daniel Arshack, Esq., by ECF and email

[5] *See also United States* v. *Rudisill*, 358 F. App'x 421 (4th Cir. 2009) (same); *United States* v. *Pierre*, 484 F.3d 75, 87 (1st Cir. 2007) (same); *United States* v. *Van Cauwenberghe*, 934 F.2d 1048, 1061 (9th Cir. 1991) (same); *Sovereign News Co.* v. *United States*, 690 F.2d 569, 577 (6th Cir. 1982) (same); *United States* v. *Hubbard*, 650 F.2d 293, 303 (D.C. Cir. 1980) (same); Fed. R. Crim. P. advisory committee note; 3 C. Wright, Federal Practice and Procedure § 673, at 761–65 (2d ed. 1982)).

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April 27, 2015

Honorable Sidney H. Stein
United States District Court Judge, Part 1
Southern District of New York
500 Pearl Street
New York, NY 10007-1312

Re: Reply to government's April 23, 2015, letter opposition, *In Re: April 13, 2015, Grand Jury Subpoena*

Dear Judge Stein:

This firm represents Maggie Tanchuck, as executrix of her parents' Estates, in connection with the above-referenced matter. We are writing in reply to the government's opposition letter of April 23, 2015 (the "Letter").

The central issue is whether the federal government may keep property that it claims was stolen even after its investigatory need ends and, moreover, even after a state court decision has vested title to the contested property. The answer has to be no. This issue is before Your Honor due to the government's refusal to agree to this commonsense premise: In the event the current litigation between the Estates and the New York Public Library (NYPL), is resolved with the New York courts awarding clear title to Ms. Tanchuck as executrix, the government should be required to return the items to her without delay. Alternatively, if NYPL prevails in the litigation, the government should be obligated to return the property to the NYPL. The government's refusal to agree to this basic proposition during our meeting with the government on April 15, 2015, and its April 23, 2015, letter to the Court, shows the need for this court's intervention exercising its supervisory authority.

In its April 23 letter, the government describes various valuable items that it claims were "stolen"[1] from the New York Public Library—a point the Library cannot "confirm," though it asserts it is the true owner.[2] The government describes indicators that the items sought were once in the NYPL's possession[3] and it proceeds to assert that Ms. Tanchuck's state court action

[1] See Government Letter, at 2.

[2] See Government Letter, at 1 ("The Library confirmed that the Items were theirs . . . .").

[3] See Government Letter, at 1.

lacks validity because, under the government's faulty analysis, her laches defense is unsound.[4] From this untenable foundation, the government leaps to the assertion that this Court lacks the power to supervise its own grand jury because *ipsi dixit* the government investigation is in "good faith,"[5] and because Ms. Tanchuck has not shown any reason why the government's subpoena is unreasonable.[6] Ms. Tanchuck is not entitled to a return of the property under Rule 41(g), it continues, because she has demonstrated neither entitlement to the property, nor that the government's seizure was illegal, nor that the government's continued need for the property has ended.[7] All these arguments are designed to avoid dealing with the single question, stated above, which is squarely before the Court.

First, the government's letter whips a straw man. Ms. Tanchuck is not demanding a return of the items ***now***; she is demanding a return of the items months, if not years, from now and, even then, ***only*** if the New York Court system first vindicates her claim to title. In that case, there would be no question as to her "lawful possession of the seized property,"[8] because her state case will resolve who has lawful title. Moreover, given the gulf of time between now and the conclusion of her state case, the government should have no need for even more time to decide what to do.[9] The government's focus on whether Ms. Tanchuck has "demonstrated that [she] [is] entitled to the lawful possession of the Contested Items," and on its need to "further its investigation" misses the point. *See* Government Letter, at 4. By the time Ms. Tanchuck's state case has concluded, "lawful possession" will have been fully adjudicated, and the government will already have had months, if not years, to "further its investigation." After all, in New York, the state court settles questions of title, not the federal grand jury.

Second, the government's argument tries to prove too much. It has demonstrated how little time it might require for this investigation. The government seems, after all, to have had enough time already to piece together thirty years of history to authenticate the items,[10] to determine who they belong to,[11] to pronounce them definitely stolen,[12] and even to prognosticate

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[4] See Government Letter, at 2, fn1.

[5] See Government Letter, at 3.

[6] Id.

[7] See Government Letter, at 3.

[8] *See* Government Letter, at 4 (citing *Ferreira v. United States*, 354 F. Supp. 2d 406, 409 [S.D.N.Y. 2005]).

[9] See Government Letter at 4 (describing, as an element to Rule 41(g) claims, that the seizure was either illegal or "the government's need for the property as evidence has ended").

[10] See Government Letter, at 1 (describing "eight priceless books [including] a workbook for Benjamin Franklin's printing house from 1759 to 1776," and that the items have "several readily observable indicators" linking to the New York Public Library).

[11] See Government Letter, at 4 (stating that the Contested Items "are the property of the Library").

[12] See Government Letter, at 2.

how this complex title-contest in state court will end.[13] All of this after the government has been in possession of the items for a mere ***ten days***. One wonders why the government would need more months, if not years, of possession and control over items about which it has already made such robust conclusions.[14]

The Estates and their executrix recognize that, in reality, and notwithstanding the government's simplistic depiction of the legal landscape, the situation is likely not to change significantly in the near future, pending the outcome of the state title-quieting action. That is why Ms. Tanchuck is willing to leave the items in the government's possession pending the outcome of the state litigation.[15] Given what the government already knows, this undoubtedly lengthy time period should be more than sufficient to allow the government time to decide how it wants to proceed. If Ms. Tanchuck's state litigation ends, and the government still has not pressed charges, the federal government should respect the state court's finding and convey the items to the party with clear title. That is all we are asking in this motion.

Third, the government's analysis of Ms. Tanchuck's laches defense adds little to assessing the validity or reasonableness of the subpoena, except that it shows that the federal government clearly favors the NYPL in the current title controversy even before a judicial determination vesting title has been made. What is more, the government's legal analysis is sorely lacking and utterly incorrect. It selectively cites to some inapposite language in the landmark decision, *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311, 320 (1991), which, divorced from context, seems to support the library's claim to the items. "To place the burden of locating stolen artwork on the true owner," the government quotes, "and to foreclose the rights of that owner to recover its property if the burden is not met would … encourage illicit trafficking in stolen art." *Id*. But the government either seriously misunderstands or intentionally neglects to state that this language stems from *Lubell*'s analysis of a statute of limitations issue, not laches. The language that the government conspicuously and intentionally

[13] See Government Letter, at 2, fn.1 ("Petitioner's laches argument does not appear to be consistent with governing New York case law").

[14] In this regard, the Government's classification of the contested items as "stolen books," that the Library was able to "confirm" that the items were "theirs," and that the Library *must* have lost the items as a result of "theft," is a fervently one-sided view of the facts. Obviously, at this point, the NYPL itself can only guess what happened to the items, as its record-keeping was so feckless that it failed to even realize the items were not in their possession until Ms. Tanchuck found them in her parents' estates and brought them to Doyle. The NYPL has not suggested that there is evidence of *any* theft. They have only said that they have not been able to find any records of a legitimate transfer. The fact that the books have not been in the NYPL's possession for almost 30 years does not establish a theft. If the NYPL had ever claimed a theft, or announced that the items were lost, or ever expressed any concern about the items' whereabouts, during that almost 30-year period the situation might be different. Instead, the NYPL did nothing. Their silence might well be evidence that the books left the NYPL in an ordinary and legal manner. The simple fact could be that they just cannot find the records of the legal transfer. Of course, over the course of nearly three decades the NYPL would have done *exactly* what they did do if the books *had* been sold or traded… nothing. The NYPL alleges that there was a theft based *only* on its inability to locate any records of having sold or transferred the items. Obviously, though, the NYPL's ability to track and maintain its materials, including the items at issue in this case for almost 30 years appears imperfect, to say the least. See, also, http://noticingnewyork.blogspot.com/2015/04/plight-of-genealogy-researching-cousin.html

[15] By so consenting, neither the Estates nor Ms. Tanchuck as executrix of those estates waive any rights or remedies in the event that the items seized by the government are lost or damaged while in the government's custody.

omits from its recitation in the *Lubell* decision actually disparages the position that the government now takes—it says, instead, that the statute-of-limitations analysis ***should not be relied upon for adjudicating a laches defense***:

> Despite our conclusion that the imposition of a reasonable diligence requirement on the museum would be inappropriate for purposes of the Statute of Limitations, our holding today **should not be seen as either sanctioning the museum's conduct or suggesting that the museum's conduct is no longer an issue in this case.** We agree with the Appellate Division that the arguments raised in the appellant's summary judgment papers are directed at the conscience of the court and its ability to bring equitable considerations to bear in the ultimate disposition of the painting. **As noted above, although appellant's Statute of Limitations argument fails, her contention that the museum did not exercise reasonable diligence in locating the painting will be considered by the Trial Judge in the context of her laches defense.** (emphasis added)

See Solomon R. Guggenheim Found. v. Lubell, 77 N.Y.2d 311, 321 (1991).[16]

Such a distortion is consistent with the government's biased drive to "investigate" Ms. Tanchuck, who, in handling her deceased parents' estates, obviously did nothing other than what the law requires, regarding the duties of Executors like her. Indeed, this application to the Court has been filed in furtherance of such duties. The Court should exercise its inherent authority to

[16] The government goes on to cite *In re Flamenbaum*, 22 N.Y.3d 962 (N.Y. 2013), out of context as well. In *Flamenbaum*, a range of items were pillaged (stolen) from a museum during World War II. Because of the number of stolen items, the museum explained that it did not report the stolen items to authorities because "it would have been difficult to report each individual object that was missing after the war." *Id.* at 965. Moreover, the estate did not show that the museum would have been able to recover the items if it *had* reported the items missing. Further, the Flamenbaum estate was unable to demonstrate prejudice, unlike in this case, because the decedent's son was aware that the item had belonged to the museum. In this case of course, until informed by Doyle that the objects had once belonged to the NYPL, Ms. Tanchuck had no idea of the item's provenance. Nevertheless, in describing *Flamenbaum*, the government ignores the weight of these factors in the court's decision. Instead, it misleadingly poaches one factor—that the estate did not show the museum would have been able to recover the items if it had reported the items missing—without analyzing the relevance of that factor at all to the present case, and it does not even mention the other two factors, which here would squarely support Ms. Tanchuck's claim.

The NYPL, of course, is not a war-pillage victim. Also, as a result of the NYPL's lack of any diligence, literally every Tanchuck family member (and indeed every NYPL employee, apparently) with direct knowledge of these items is now deceased and therefore unable to explain the manner of the transfer of the items out of the NYPL's possession and into the possession of the estates of Ms. Tanchuck's parents. In this regard, a better analysis of the issues presented in Ms. Tanchuck's New York claim is *Bakalar v. Vara*, 819 F. Supp.2d 293, 303 (S.D.N.Y. 2011), which describes the validity of a laches defense thusly: "Of the greatest significance is the death of Mathilde Lukacs in 1979, perhaps the only person who could have elucidated the manner in which she came to possess the Drawing, or indeed, whether she owned it at all." Here, Ms. Tanchuck has suffered the same prejudice, through the deaths of both of her parents—and now made worse because her inability to trace the source of the contested items has inexplicably and unfairly landed her as a target of a biased federal investigation.

curb this sort of overreaching. *See, e.g., In re Grand Jury Investigation (General Motors Corp.)*, 32 F.R.D. 175, 181 (S.D.N.Y. 1963) ("The grand jury is subject to control and supervision of the court. General Motors' claim of abuse of process, even absent *locus standi*, is sufficient to invoke this court's inherent power to supervise the grand jury so as to prevent the perversion of its process").

Fourth, the government overlooks the most significant lesson from the *Lubell* and *Flamenbaum* cases: In neither case did federal investigators inject themselves into the civil controversy. The government's conduct here, by contrast, is truly unjustly aggressive. In those other cases the federal government respected federal-state comity. We ask the Court likewise to be guided by considerations of comity here, since the government seems disinclined to do so. Comity should allow the state litigants to proceed without inappropriate and heavy-handed prosecutorial interference. Unlike in *Lubell* and *Flamenbaum*, here we see no similar restraint.[17] We have, instead, a well-connected institution demanding to get its way via threats of penal intervention, and then federal prosecutors bowing to those inappropriate threats by dangling the prospect of a grand jury investigation and weighing in with threats of indictment. As indicated in our initial motion, the United States Attorney's Office should not be permitted to conscript the grand jury process in order to help its friends gain an edge in civil litigation. *See, e.g., United States v. Fisher*, 455 F.2d 1101, 1104-05 (2d Cir. 1972) (noting that the "grand jury is not meant to be the private tool of a prosecutor").

Finally, the government's arrogance burns bright when it insinuates that, because it has already successfully taken possession (albeit via a faulty subpoena) which *explicitly* called for the production of the "business records" of Doyle but which nonetheless seized only rare books--Ms. Tanchuck lacks any redress. *See* Government Letter, at 3. If this notion were seriously credited, the government would be free to intimidate (as they did in this case) third-parties into turning over any property, effectively banishing from the process any rightful owner who happened to be absent when the government seized the items. Indeed, that does appear to be the tactic here. The subpoena to third-party Doyle which called for the production of Doyle's business records, with no advanced notice to Ms. Tanchuck, resulted in the seizure of the contested items from Doyle by federal agents who showed up on Doyle's doorstep. That subpoena even admonished Doyle not to tell anyone that the government was seeking the material it took, thereby encouraging Doyle to breach its fiduciary duty to Ms. Tanchuck. Of course, this is the opposite of what federal law actually directs. Under Federal Rule of Criminal Procedure 17(c), compliance with a subpoena is unreasonable or oppressive when "the manner of service strip[s] the court of its authority to oversee the subpoena process and denie[s] the defendant the opportunity to challenge its validity." *United States v. Barr*, 605 F. Supp. 114, 118 (S.D.N.Y. 1985) (citing *In Re Nwamu*, 421 F. Supp. 1361 [S.D.N.Y. 1976]). But that is what the government seeks here. It has subpoenaed business records and instead seized rare books without notice to the owners, and then tried to deny those owners opportunity to contest the subpoena or to seek meaningful judicial oversight.

[17] In footnote 3 of its letter, the government makes several contentions about the sequence of events surrounding the subpoenas in issue. Suffice it to say, the government's recollection of these events is troublingly flawed—as can be demonstrated, if necessary, through notes that were taken contemporaneously with government communications and the actual telephone message left by the Assistant United States Attorney when she called the offices of the undersigned.

The Court possesses inherent authority to prevent civil litigants from importuning the United States Attorney's office to become its private claim enforcement agency. Likewise the Court has the authority to prevent the United States Attorney's Office, as in this case, from turning grand juries into weapons against private civil litigants. The Court possesses authority under Rule 17(c) to modify the subpoena to render it more reasonable. And if the government is correct that these matters are best governed by Federal Rule of Criminal Procedure 41(g), even then, the Court would have authority to order the return of the items to the true owner, under the conditions suggested here. Accordingly, in the event Ms. Tanchuck's claims over the contested items are vindicated in state court, she respectfully requests that the government be required to return the items to her.

Respectfully,

Daniel N. Arshack